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LUKE NNAEMEKA UGWU v. PP

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
HARMINDAR SINGH DHALIWAL JCA
STEPHEN CHUNG JCA
B [CRIMINAL APPEAL NO: B-05(M)-266-06-2017(NGA)]
10 JUNE 2019

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Accused charged for offence of trafficking in dangerous drugs – Drugs found concealed in bag – Whether accused had knowledge of drugs – Whether accused's defence of innocent carrier probable*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Accused convicted for offence of trafficking in dangerous drugs – Drugs found concealed in bag – Accused sentenced to death – Whether accused had knowledge of drugs – Whether accused innocent carrier – Whether there was wilful blindness – Whether accused's defence of innocent carrier probable – Whether conviction and sentence safe – Dangerous Drugs Act 1952, s. 39B(1)(a)*

E ***EVIDENCE:*** *Adverse inference – Non-production of witness – Accused charged for offence of trafficking in dangerous drugs – Drugs found concealed in bag – Prosecution failed to secure attendance of witness offered to defence – Prosecution failed to tender witness' statement made pursuant to s. 112 of Criminal Procedure Code – Whether adverse inference ought be invoked against prosecution – Evidence Act 1950, s. 114(g)*

F The appellant, a Nigerian, was arrested at the Kuala Lumpur International Airport when the luggage ('exh. P34') that he was carrying was found to conceal 752.4g of methamphetamine. The appellant was charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Satisfied that the prosecution had
G established a *prima facie* case, the trial judge called the appellant to enter his defence. In his defence, the appellant denied knowledge of the drugs and submitted that: (i) he was studying in Malaysia and had gone back to Nigeria; (ii) while in Nigeria, he got in touch with Uche, the brother of his housemate in Malaysia, Oyebu; (iii) Uche gave exh. P34 to him to be given to Oyebu;
H (iv) Uche had opened exh. P34 to show its interior to the appellant and he, upon inspecting the same, did not see nor detect anything unusual; (v) when the drugs were discovered in exh. P34, he had informed the customs officer 'This bag, Uche give me'; (vi) he had told the investigating officer the reasons and circumstances that led him to carrying exh. P34 into Malaysia, especially in relation to Uche and Oyebu; and (vii) his other housemate,
I Oscar, would be the best person to verify the existence of Oyebu. The prosecution failed (i) to secure the attendance of Oscar after offering him to the defence at the close of the prosecution's case; and (ii) to supply Oscar's

statement to the defence, made pursuant to s. 112 of the Criminal Procedure Code ('CPC') ('Oscar's s. 112 CPC statement'). At the conclusion of the trial, the trial judge found that (i) the appellant's version was highly improbable and his defence was a mere denial and an afterthought; and (ii) the appellant failed to rebut his statutory presumption under s. 37(d) of the DDA and failed to cast a reasonable doubt on the prosecution's case. The appellant was convicted for the offence and sentenced to death. Hence, the present appeal. The issues that arose for adjudication were (i) whether the trial judge failed to adequately consider the appellant's defence of innocent carrier; and (ii) whether adverse inference ought to have been invoked against the prosecution for their non-calling of Oscar and/or non-tendering of Oscar's s. 112 CPC statement.

Held (allowing appeal)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The defence of innocent carrier could not be divorced from the issue of wilful blindness. The law will not protect a person who has wilfully turned a blind eye to obvious circumstances which raise suspicion such that an inquiry is mandated to obviate the suspicion. The key threshold in the doctrine of wilful blindness is there must first be suspicion followed by, and coupled with, a deliberate decision to not make further investigations. (para 25)

(2) The trial judge failed to consider the defence of innocent carrier. All the trial judge found was that the version of the appellant was highly improbable and the defence of the appellant was a mere denial and an afterthought. The appellant's defence of innocent carrier could not be an afterthought. The case for the defence was put to the relevant witnesses and the record of appeal was replete with suggestions and challenges made to the witnesses on this particular defence. The witnesses denied that the appellant told them his version but when the appellant had reiterated these matters in his testimony on oath, the suggestions crystallised into evidence and the trial judge was duty bound to consider the appellant's defence. (paras 27-29)

(3) The defence of innocent carrier was not an implausible one. Significantly, the factual matrix of the present case did not disclose any circumstances to raise suspicion for the appellant to be put on inquiry. There was nothing intrinsically sinister about Uche's request for the appellant to carry the bag and to pass the same to Oyebu. The appellant had also inspected the bag and found it to be empty and unsuspicious. It was also significant that the packages were ingeniously and cunningly concealed behind the panel covering the telescopic handle in exh. P34. In addition to that, the conduct of the appellant, at all material times, was consistent with his lack of knowledge of the existence of the drugs

A in exh. P34. There were sufficient and compelling reasons to accept that the appellant was an innocent carrier who could not be guilty of wilful blindness. (paras 30 & 31)

(4) The appellant had been deprived of due consideration of his defence. The failure of the trial judge to address his mind to the defence of
B innocent carrier, mounted by the appellant, had gravely prejudiced the appellant. It was a non-direction amounting to a misdirection which had occasioned a miscarriage of justice. A proper appreciation of the defence would have concluded that the appellant's defence was more probable and therefore, the presumption under s. 37(d) of the DDA would have
C been rebutted. (para 32)

(5) In order to protect the integrity of the trial process, the prosecution must ensure that all witnesses offered, which the defence intend to call, are provided to the defence. In the event that, for good reasons, the attendance of the witnesses offered could not be procured, it is
D imperative for the prosecution to, at least, provide the s. 112 CPC statement to the defence so that, if the circumstances so warrant, they could tender such statement for the court's consideration. In the best interest of a fair trial, it would not be fair and just for the prosecution to keep such evidence from the defence. The present case was one where
E adverse inference, under s. 114(g) of the Evidence Act 1950, ought to have been invoked against the prosecution. The invocation of adverse inference against the prosecution further cast a doubt on the prosecution's case such that the order for conviction of the appellant could not be sustained. (paras 38 & 39)

F **(6)** A miscarriage of justice had occurred such that the conviction of the appellant was wholly unsafe. Accordingly, the conviction and death sentence of the High Court were set aside. The appellant was ordered to be acquitted and discharged. (para 40)

G **Case(s) referred to:**
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Fakhrurrazi Hasan v. PP [2017] 2 CLJ 125 FC ***(refd)***
Kobra Taba Seidali v. PP [2014] 2 CLJ 12 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
H *Parlan Dadeh v. PP [2009] 1 CLJ 717 FC* ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Asnawi Yusuf [2012] 3 CLJ 41 CA ***(refd)***
PP v. Herlina Purnama Sari [2016] 1 LNS 1855 FC ***(refd)***
Pragalathan Balakrishnan v. PP [2018] 2 CLJ 420 CA ***(refd)***
R v. Lambert [2002] 2 AC 545 ***(refd)***
I *Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356* ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(1)(a), First Schedule
Evidence Act 1950, s. 114(g)

For the appellant - Wan Azwan Aiman & Aiman Ariff Abdul Aziz; M/s Azwan Aiman Forsberg & Co
For the respondent - Syarifuddin Abdul Rasa; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-244-10-2012 (overruled).]

Reported by Najib Tamby

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] The appellant was charged in the High Court at Shah Alam for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). The charge reads as follows:

> Bahawa kamu pada 15 Mei 2012 lebih kurang jam 9.25 malam di Cawangan Pemeriksaan Penumpang KLIA (CPP1), Balai Ketibaan Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu Methamphetamine seberat 725.4 gram, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] After a retrial as ordered by the Federal Court on 29 June 2016, the appellant, on 16 June 2017, was found guilty of the offence and sentenced to death by the High Court. The appellant then filed an appeal to this court. The appeal was heard on 1 April 2019. At the conclusion of the submissions, we unanimously allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellant was acquitted and discharged. Our reasons for doing so now follow.

The Case For The Prosecution

[3] The factual matrix of the case falls within a narrow compass. On 15 May 2012, at about 9pm, Mohd Izuan Shah bin Abd Jalil ("PW6") who was on duty together with Mohamad Izuwan bin Mohd Ali ("PW8") at the customs clearance at KLIA noticed the appellant walking towards the green lane of customs clearance carrying a grey wheeled luggage ("exh. P34").

[4] PW6 then instructed the appellant to go through the red lane to have his luggage scanned, to which the appellant obliged and voluntarily placed exh. P34 on the conveyor belt for scanning. PW6 noticed a suspicious image

on the monitor and PW8 then instructed the appellant to open his luggage at the inspection table and to take out the contents of exh. P34 to which the appellant also cooperated and obliged. The appellant emptied the contents of exh. P34 which contents were made up of clothing items, food items, toiletries, and personal effects.

[5] As PW6 was unsure of the location of the suspicious items, exh. P34 was scanned again for the second time. After the second scan, PW6 again noticed the suspicious image generated by the scanner and then lodged a police report. The appellant was taken to the cawangan pemeriksaan penumpang 1 (CPP1) for further action.

[6] At about 11pm, officers from the customs enforcement unit arrived consisting of Muhammad Bukhori Alias ("PW9"), Ahmad Yazid Khan ("PW5") and the late Rasid Ahmad at the CPP1. PW9 then instructed PW8 to pry open a panel of the luggage bag which was a panel covering the telescopic handle of exh. P34. Underneath the said panel, the officers found four packages wrapped in carbon papers concealed therein. PW8 conducted a test using a "test-kit", and the contents tested positive for "methamphetamine".

[7] The appellant and the impugned drugs were brought back by the investigating officer, PW9, for further investigation. The four packages were subsequently sent to the chemistry department for analysis. The chemist, Zulkefli bin Mohd Edin ("SP4"), certified the four packages to be 752.4g of methamphetamine which formed the subject matter of the charge. Methamphetamine is listed in the First Schedule of the Act.

Decision At The End Of The Prosecution's Case

[8] At the end of the case for the prosecution, the learned trial judge found that the element of possession coupled with knowledge of the illicit drugs had been proved against the appellant by the invocation of the presumption under s. 37(d) of the Act. Essentially, the whole substratum of the prosecution's case against the appellant rested solely on the discovery of the impugned drugs concealed underneath the panel covering the telescopic handles of exh. P34. The prosecution had relied on the statutory presumption of knowledge and possession under s. 37(d) of the Act to bring home the element of possession against the appellant.

[9] On the element of trafficking, the learned judge accepted that the act of "transporting" under s. 2 of the Act had been proved against the appellant. The learned judge found that a *prima facie* case had been made out against the appellant on the charge. Accordingly, the appellant was ordered to enter his defence.

The Defence Case

[10] The appellant chose to give evidence on oath. There were no other witnesses although the defence had intended to call one other witness who was offered but who then could not be traced by the prosecution. We will come back to this witness later. Essentially, the defence of the appellant was that of an innocent carrier.

[11] The appellant testified that he is a student in Malaysia and went back to his hometown in Nigeria to visit his ailing father for a few days. His hometown is about a five hour bus ride from Lagos. A few days before his return to Malaysia, the appellant was in touch with "Uche", his senior in school while he was in Nigeria. At that point, the appellant had known Uche for about three years.

[12] Uche is also connected to the appellant in that he is Oyebu's brother and Oyebu is one of the appellant's housemates in Klang, Selangor. Oyebu is a 23 years old Nigerian student in Malaysia.

[13] Before the appellant left for Malaysia, Uche contacted the appellant and insisted that they meet up in Lagos, Nigeria. Since the appellant had to fly back to Malaysia *via* Lagos, Nigeria, the appellant obliged and spent the night at Uche's house in Lagos. The reason for their meet up was also because Uche wanted the appellant's help to pass a luggage bag to his brother Oyebu. Once he arrived in Lagos, Uche picked up the appellant at the bus stop. He later passed the luggage bag to the appellant and requested the appellant to pass the same to his brother, Oyebu. The appellant was told that the luggage bag was Oyebu's favourite luggage bag.

[14] The appellant testified that when he received the luggage bag, it was Uche who opened the luggage bag and had shown the interior of the bag to the appellant. The appellant saw nothing in the luggage bag and he even personally inspected the same. He testified that at that point in time there was no crack or any odour/smell permeating from the luggage bag. There was also no tampering or adjustment made to the luggage bag as far as the appellant could observe. According to the appellant, at all material times, the condition of the luggage bag was not unusual. There was nothing amiss or unusual which should raise his suspicion.

[15] The appellant maintained that he had informed PW6: "This bag, Uche give me" when the impugned packages were discovered concealed in the luggage bag. This was of course denied by PW6 although PW6 himself admitted in evidence that he could not recall or ascertain with certainty what was said by the appellant to him.

[16] The appellant also maintained that he had narrated to PW9 as to the reasons and circumstances that led him to carry the luggage bag into Malaysia especially in relation to Uche and Oyebu, his housemate. PW9 had flatly denied the same. Notwithstanding PW9's denial of the appellant's version,

A it turned out that PW9 had in fact made his way to the appellant's house in Klang after the appellant's arrest. PW9 had taken a statement from one of the occupants in the house, a Nigerian national by the name of Ogochukwu Oscar Peter ("Oscar Peter"). The appellant claimed that Oscar Peter was his housemate together with Oyebu and one "Chinedu".

B **[17]** Now, this Oscar Peter was listed as a prosecution witness. He was not called but offered to the defence at the close of the prosecution's case. When the defence elected to call Oscar Peter, the prosecution failed to secure his attendance although immigration records showed that he had never left the country. The prosecution did not also supply Oscar Peter's s. 112 of the C Criminal Procedure Code ("CPC") statement to the defence. Instead, the prosecution recalled PW9 as a rebuttal witness to challenge the appellant's version of events.

Findings Of The High Court

D **[18]** At the conclusion of the trial, the learned judge found the explanation of the appellant in denying any knowledge of the drugs to be highly improbable. The learned judge found that the appellant had failed to rebut the statutory presumption under s. 37(d) of the Act. The learned judge also criticised the appellant's defence for having failed to prove on a balance of E probabilities the existence of Oyebu or that Oyebu was in fact his housemate.

[19] The learned judge found that the appellant had failed to cast a reasonable doubt on the case for the prosecution. The judge also found that a case beyond reasonable doubt had been made out against the appellant on the offence with which he was charged. The appellant was accordingly F convicted and sentenced to death.

The Instant Appeal

[20] Before us, although the petition of appeal contained several grounds, counsel for the appellant submitted that the main issue to be canvassed on appeal was whether there was a failure by the trial judge to adequately and G properly consider the appellant's defence of innocent carrier. Allied to this issue was the question of whether adverse inference ought to have been invoked against the prosecution for their non-calling and/or non-tendering of Oscar Peter's s. 112 CPC statement.

H **[21]** In this respect, it was argued by learned counsel for the appellant that the learned trial judge erred when he failed to judicially appreciate the whole of the defence case and did not conduct a maximum evaluation of the evidence adduced. It was submitted that the learned trial judge had not considered at all the appellant's defence of innocent carrier.

I **[22]** At the outset, we must observe that this defence of innocent carrier, or sometimes called innocent possession (see *R v. Lambert* [2002] 2 AC 545), is merely a label to connote lack of knowledge of any dangerous drugs found in any package or container which the accused person acknowledges that he

or she was carrying. Now, of course, any accused person caught in physical control of such a package will invariably deny knowledge or claim ignorance. The community would not be protected if accused persons are let off for merely claiming ignorance. The approach then to be adopted in such cases was advocated by Lord Wilberforce in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 ("*Warner*") at p. 394:

> In all such cases, the starting point will be that the accused had physical control of something – a package, a bottle, a container – found to contain the substance. This is evidence – generally strong evidence – of possession. It calls for an explanation: the explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make the statutory possession.

[23] We must, however, observe that in *Warner* (*supra*), their Lordships were divided on the meaning to be ascribed to the word "possession". Part of the reason for the difference in views may be attributed to the lack of clarity in the intention of parliament as to the mental element required for the offence. The decision in *Warner* (*supra*) may have inspired the introduction of the new Misuse of Drugs Act 1971 which enabled an accused person to obtain an acquittal in cases of "innocent possession".

[24] Back home there is no such controversy. In a nutshell, for the prosecution to secure a conviction under s. 39B(1) of the Act, it must be established that the accused was in possession of the impugned drugs by proving custody and control (the *actus reus*) and knowledge (the *mens rea*). Possession is presumed by proving custody or control of any dangerous drug and knowledge of the nature of such drug is then presumed until the contrary is proved by resort to the presumption under s. 37(d) of the Act. Thomson J (later Lord President) in the oft-quoted case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237 also alluded to the physical element and the mental element to establish possession.

[25] Coming now to the defence of innocent carrier, the authorities suggest that this defence cannot be divorced from the issue of wilful blindness. The law will not protect a person who has wilfully turned a blind eye to obvious circumstances which raise suspicion such that an inquiry is mandated to obviate the suspicion (see *PP v. Herlina Purnama Sari* [2016] 1 LNS 1855; [2017] 1 MLRA 499). In such a case, the law will impute knowledge. The key threshold element in the doctrine of wilful blindness is that there must first be suspicion followed by (and coupled with) a deliberate decision not to make further investigations.

[26] We must, however, hasten to observe that every case in which the defence of innocent carrier and the question of wilful blindness are asserted will have a different factual matrix. The analysis and outcome will depend

on the peculiar facts and circumstances of each case. Direct proof of knowledge is inherently problematic unless the accused person confesses to knowledge of the illicit drugs. So, in most cases, knowledge can only be inferred from proved facts and circumstances (see *Chan Peon Leon v. PP (supra)*; *Wong Nam Loi v. PP* [1998] 1 CLJ 37; *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; [2007] 4 AMR 269; *Parlan Dadeh v. PP* [2009] 1 CLJ 717; *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 and *Fakhrurrazi Hasan v. PP* [2017] 2 CLJ 125). Since the facts and circumstances differ from case to case, an over-reliance and fixated approach on the facts of other cases can lead to confusion and sometimes error.

[27] Reverting to the instant case, we agreed with the appellant that the learned judge had failed to consider the defence of innocent carrier. With respect, all that the learned judge found was that the version of the appellant was highly improbable and the defence of the appellant was a mere denial and an afterthought.

[28] Now, this defence of innocent carrier, in our view, could not be an afterthought. We noted that the case for the defence was put to the relevant witnesses and the record of appeal was replete with suggestions and challenges made to the witnesses on this particular defence. For example, the cross-examination of PW6 is illustrative (at p. 19 appeal record, vol. 2):

> S: Setuju dengan kebolehan Bahasa Inggeris terhad, dia kata berikut "This bag, 'Uche' give me"?
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> J: Saya tak ingat.

[29] Similar challenges were also made to PW8 at pp. 29-30 and to the investigating officer (PW9) at p. 38 of the same appeal record. These witnesses had, however, denied the appellant ever telling them his version. However, when the appellant had reiterated these matters in his testimony on oath, the suggestions crystallised into evidence and the learned trial judge was duty-bound to consider the appellant's defence.

[30] The facts and circumstances show, in our view, that the defence of innocent carrier was not an implausible one. Significantly, the factual matrix in the present case did not disclose any circumstances to raise suspicion for the appellant to be put on inquiry. There was nothing intrinsically sinister about Uche's request for the appellant to carry the bag and to pass the same to Oyebu, the appellant's housemate. The appellant had also inspected the bag and found it to be empty and unsuspicious. It was also significant that the packages were ingeniously and cunningly concealed behind the panel covering the telescopic handle in the bag (exh. P34). This was readily conceded by the prosecution witnesses and noted by the learned judge.

[31] In addition to the foregoing matters which negated any suggestion of anything suspicious of the luggage bag received by the appellant, the conduct of the appellant at all material times was consistent with his lack of

knowledge of the existence of the impugned drugs in the bag (exh. P34). In our view, there were certainly sufficient and compelling reasons to accept that the appellant was an innocent carrier who could not be guilty of willful blindness.

[32] In the circumstances, we had serious misgivings as to whether the salutary direction in *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263 had been followed by the learned judge. The appellant had been deprived of due consideration of his defence. In our respectful view, the failure of the learned trial judge to address his mind to the defence of innocent carrier mounted by the appellant had gravely prejudiced the appellant. It was certainly a non-direction amounting to a misdirection which had occasioned a miscarriage of justice. A proper appreciation of the defence would have concluded that the appellant's defence was more than probable and therefore the presumption under s. 37(d) of the Act would have been rebutted.

[33] Although this would be sufficient to dispose of this appeal, there was another serious infirmity which we were compelled to address. This was the failure of the prosecution to secure the attendance of the witness Oscar Peter or at least to furnish the defence with the s. 112 CPC witness statement of that witness who was offered to the defence.

[34] Now, this Oscar Peter was certainly not an irrelevant witness as the learned judge seemed to think. It was the appellant's defence that Oscar Peter was also living with the appellant in Taman Sentosa, Klang. As such, this witness would be the best person to verify and substantiate the existence of Oyebu, the intended recipient of the bag (exh. P34). It was in evidence that the investigating officer (PW9) had himself gone to the appellant's house in Klang and had arrested and even recorded Oscar Peter's statement for the purposes of investigation.

[35] The law in this regard appears settled. This court in *PP v. Asnawi Yusuf* [2012] 3 CLJ 41 held that when witnesses were offered to the prosecution by the defence, it was the bounden duty of the prosecution to avail those witnesses for the defence. If in the exercise of that duty, the prosecution failed to fulfil that obligation, the accused must be acquitted. The court observed (at p. 49):

> [22] Learned defence counsel gave ample warning to alert the court and especially to the learned deputy public prosecutor that it was his intention to call those witnesses including but not limited to M Dahlan, Edy Shahputra and Abdul Rahman.
>
> [23] Now, perhaps curiously, when learned defence counsel wanted the above named three witnesses to testify, the public prosecutor said that all of them were not available. The reason proffered was that they cannot be traced as they are Indonesians! Such reason is simply untenable and indefensible particularly in a case involving the liberty of an individual. We

A have provisions in our laws to ensure that this would not have happened. It is clear law that when witnesses are offered by the prosecution to the defence at the end of the case for the prosecution, it is the bounden duty of the prosecution to avail these witnesses for the defence. If in the exercise of this duty, the prosecution fails to fulfill this obligation, the accused must be acquitted.

B

[36] In *Pragalathan Balakrishnan v. PP* [2018] 2 CLJ 420, this court also noted that if the prosecution had told the trial judge that a particular witness offered to the defence cannot now be located, the prosecution could have at least provided the s. 112 CPC statement to the defence so that they could then have some opportunity to deal with it or even introduce it into evidence if the law permitted it.

C

[37] In this context as well, this court in *Kobra Taba Seidali v. PP* [2014] 2 CLJ 12 had occasion to hold that failure of the prosecution to produce the witness or hand over a copy of the witness statement to the defence to be used by the defence at the defence stage was fatal on the factual matrix of that case.

D

[38] In our view, in order to protect the integrity of the trial process, the prosecution must ensure that all witnesses offered, which the defence intends to call, are provided to the defence. In the event that for good reason the attendance of the witness offered cannot be procured, it is imperative for the prosecution to at least provide the s. 112 CPC statement to the defence so that if the circumstances so warrant, they could tender such statement for the court's consideration.

E

[39] In the interests of a fair trial, it would not be fair and just for the prosecution to keep such evidence from the defence. If the circumstances so warrant, an adverse inference could be drawn for the prosecution's failure in this regard. In our view, the present case was one where adverse inference under s. 114(g) of the Evidence Act 1950 ought to have been invoked against the prosecution. In the premises, the invocation of adverse inference against the prosecution further cast a doubt on the case for the prosecution such that the order for conviction of the appellant could not be sustained.

F

G

Conclusion

[40] In the circumstances, and for the reasons we have provided, we were satisfied that a miscarriage of justice had occurred such that the conviction of the appellant on the charge was wholly unsafe. Accordingly, we had set aside the conviction and death sentence of the High Court and ordered the appellant to be acquitted and discharged.

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